

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANT'S BRIEF AND APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,946

HAZEL W. MARKS, *Appellant*

v.

JOHN L. MARKS, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

JOHN J. O'BRIEN and
FRED SOMKIN

216 Evans Building
1420 New York Avenue, N. W.
Washington 5, D. C.

Attorneys for Appellant

FILED OCT 26 1953

Joseph W. Stewart

CLERK

Statement of Question Presented

When a divorced wife moves the Court to vacate a decree of divorce, or when she moves the Court to modify the custody provisions of the decree, may the Court, upon denying her motions, order her to pay an attorney fee to her ex-husband's counsel?

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,946

HAZEL W. MARKS, *Appellant*

v.

JOHN L. MARKS, *Appellee*

***APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA***

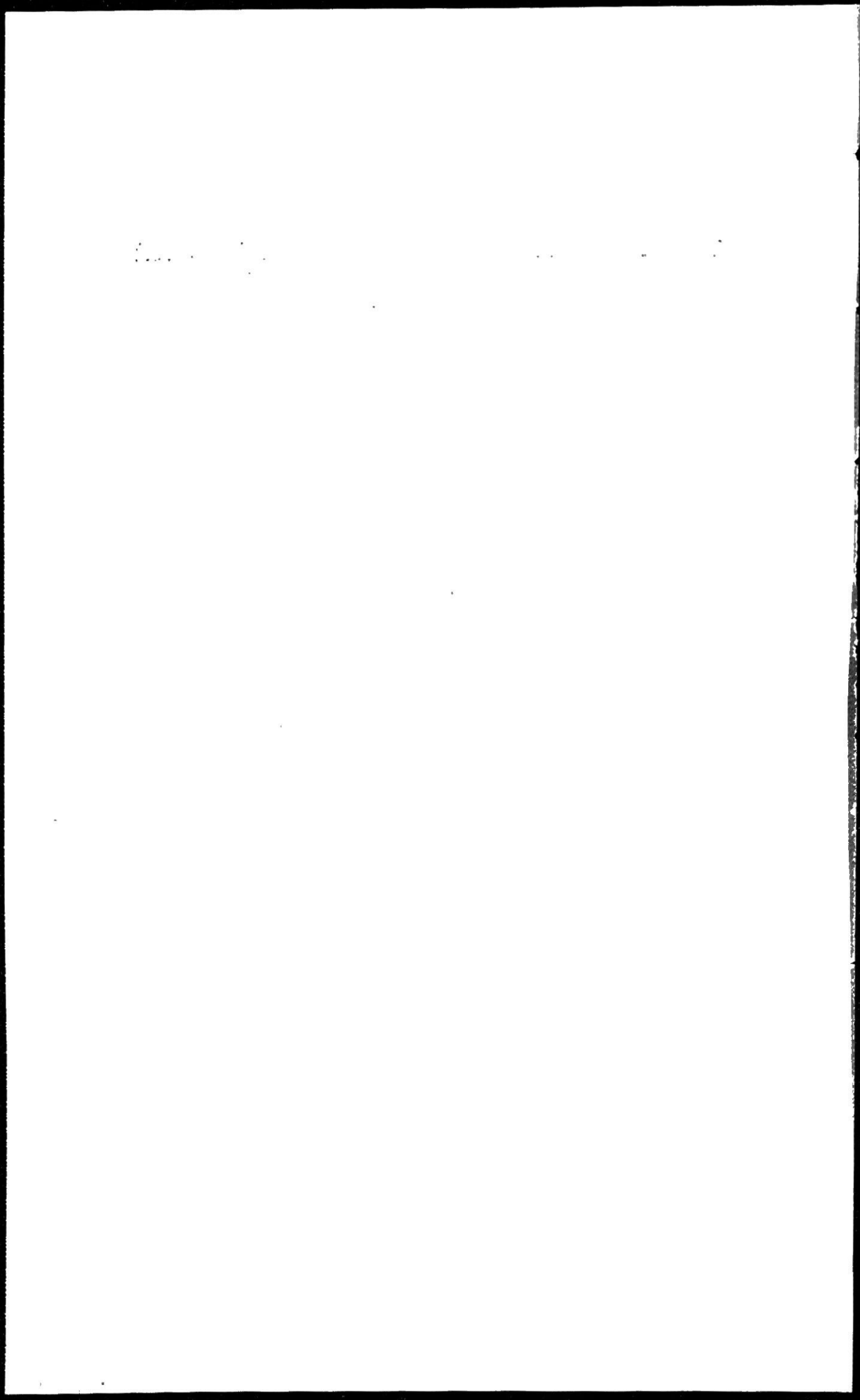


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APPELLANT'S BRIEF

Jurisdictional Statement

United States Dist. Court for the District of Columbia had jurisdiction under Title 16 Section 413, Code of laws for the Dist. of Col.

This Court has jurisdiction of this appeal under Section 1291, of Title 28, United States Code.

Statement of Case

The parties to this action were married to each other on July 1, 1926, and the husband, appellee herein, on December 18, 1952, was awarded an absolute divorce on the ground of desertion. He was also awarded permanent custody of the three minor children. The wife, appellant herein, was granted certain rights of visitation, and in addition the right to request the Court to modify her visitation rights as to one of the children was preserved to her.

Thereafter, on June 11, 1953, appellant wife filed motions to vacate the decree and to modify the provisions thereof. Both motions were heard and denied on June 30, 1953, and the lower court, in addition to denying the motions, ordered appellant to pay a \$50. attorney fee to her former husband's attorney. This appeal is taken from that portion of the Order which granted the attorney fee.

Statutes Involved

Title 16, Sections 410 and 413 of the Code of Laws for the District of Columbia.

Statement of Point

The Court erred in ordering appellant to pay an attorney fee to the attorney for her former husband.

Summary of Argument

The Court erred in ordering appellant to pay a \$50. attorney fee to the attorney for her former husband, since there is no authority in law for such an award, and express authority is needed.

Argument

As a general principle of law, the right to recover attorney's fees does not exist in the absence of statute (14 Am. Jur. 38).

In the District of Columbia, a statute (D. C. Code, 16-410), permits the wife, during pendency of a suit for divorce, to be awarded counsel fees.

Another statute, (D. C. Code, 16-413), permits the wife to receive counsel fees in connection with alimony or custody of children even after a decree of divorce has been granted (*Junghans v. Junghans*, 72 App. D. C. 129). But there is no statute permitting the husband to be granted a counsel fee under like circumstances. There is no authority for the granting of such a fee, and without such authority no such fee may be granted.

Conclusion

For the foregoing reasons it is apparent that the Court below had no power to order the appellant to pay an attorney fee to her former husband's attorney, and the Order of June 30, 1953, insofar as it orders her to pay such a fee, should be reversed and vacated.

Respectfully submitted,

JOHN J. O'BRIEN, and FRED SOMKIN,
Attorneys for Appellant.

Summary of Argument

The Court erred in ordering appellant to pay a \$50. attorney fee to the attorney for her former husband, since there is no authority in law for such an award, and express authority is needed.

Argument

As a general principle of law, the right to recover attorney's fees does not exist in the absence of statute (14 Am. Jur. 38).

In the District of Columbia, a statute (D. C. Code, 16-410), permits the wife, during pendency of a suit for divorce, to be awarded counsel fees.

Another statute, (D. C. Code, 16-413), permits the wife to receive counsel fees in connection with alimony or custody of children even after a decree of divorce has been granted (*Junghans v. Junghans*, 72 App. D. C. 129). But there is no statute permitting the husband to be granted a counsel fee under like circumstances. There is no authority for the granting of such a fee, and without such authority no such fee may be granted.

Conclusion

For the foregoing reasons it is apparent that the Court below had no power to order the appellant to pay an attorney fee to her former husband's attorney, and the Order of June 30, 1953, insofar as it orders her to pay such a fee, should be reversed and vacated.

Respectfully submitted,

JOHN J. O'BRIEN, and FRED SOMKIN,
Attorneys for Appellant.

APPENDIX

Case No. 11,946

APPENDIX

Case No. 11,946

**IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOHN L. MARKS, 1207 I Street, N. E., Washington, D. C.,
Plaintiff,

vs.

HAZEL W. MARKS, 1924 Pennsylvania Ave., N. W.,
Residence,

or

c/o Woodward Building, 15th & H Streets, N. W.,
(custodial employee-hrs. 5:30 to 12:00 a. m.)

Employment,
Washington, D. C.,

Defendant.

Civil Action No. 3934-52

Complaint for Absolute Divorce

(Filed Sep. 4, 1952)

Harry M. Hull, Clerk

1. Plaintiff is a citizen of the United States and a resident of the District of Columbia and has been a resident for more than two (2) years prior to the date of filing this complaint.

2. Defendant, Hazel W. Marks, is a citizen of the United States and a resident of the District of Columbia.

3. That plaintiff and defendant are husband and wife, having been married in Rockville, Maryland on July 1, 1926.

APPENDIX

Case No. 11,946

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District of Columbia, ss.:

JOHN L. MARKS, being first duly sworn on oath, deposes and says that he is the plaintiff above named and that the matters and things stated therein are true.

/s/ JOHN L. MARKS.

Subscribed and sworn to before me this 3rd day of September, 1952.

/s/ ANN C. WOLFE,
Notary Public, D. C.

/s/ BENJAMIN F. ROSSNER,
Attorney for Plaintiff,
Barr Building,
910 Seventeenth Street, N. W.,
Washington 6, D. C.,
DIstrict 6700.

Answer to Complaint for Absolute Divorce

(Filed Sep. 20, 1952.)

Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOHN L. MARKS,

Plaintiff,

vs.

HAZEL W. MARKS, 1924 Pennsylvania Ave., N. W.,
Defendant.

Civil Action No. 3934-52

Defendant, HAZEL W. MARKS, in answering the complaint for absolute divorce under ground of desertion sets forth:

1. Defendant admits the allegations of paragraph one pertaining to citizenship and residence of the plaintiff.

2. Defendant admits the allegations of paragraph two of the complaint reference to citizenship and residence of this defendant.

3. Defendant admits the allegations of paragraph three, admitting the date and place of marriage of defendant to plaintiff.

4. Allegations of paragraph four are admitted which pertain to the birth of five children three of whom are still minors and that said children are in custody of plaintiff.

4. There are five children of said marriage. Two children, Betty Melba Marks and Carl Alfred Marks are over 21 and three children are minors: Robert Wilson is 16 years of age, Charlotte Ann is 13 years of age and Sandra Marie is 9 years of age. All minor children have at all times been in the care and custody of the plaintiff.

5. That there are no property rights involved.

6. That the plaintiff and defendant lived together at 809 C Street N. E. That on August 28, 1950 the defendant deserted the plaintiff without any reason or cause.

7. That the plaintiff, since the defendant's desertion continued to reside at 809 C Street, N. E., and on November 1, 1951 moved to 1207 Eye Street, N. E., and he still presently resides there.

8. Upon information and belief, the defendant since the date of the separation aforerelated lived at 2511 Pennsylvania Avenue, N. W. and that in October, 1950 she moved to 1924 Pennsylvania Avenue where it is alleged she still presently resides.

WHEREFORE, the premises considered, plaintiff requests this court as follows:

1. That he be granted an absolute divorce from the defendant on the ground of two (2) years desertion by defendant.

2. That he be granted permanent custody of Robert Wilson Marks, Charlotte Ann Marks and Sandra Marie Marks.

3. For such other and further relief as to the court might seem just and proper.

/s/ JOHN L. MARKS.

APPENDIX

Case No. 11,946

**IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOHN L. MARKS, 1207 I Street, N. E., Washington, D. C.,
Plaintiff,

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HAZEL W. MARKS, 1924 Pennsylvania Ave., N. W.,
Residence,

or

c/o Woodward Building, 15th & H Streets, N. W.,
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Employment,
Washington, D. C.,

Defendant.

Civil Action No. 3934-52

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(Filed Sep. 4, 1952)

Harry M. Hull, Clerk

1. Plaintiff is a citizen of the United States and a resident of the District of Columbia and has been a resident for more than two (2) years prior to the date of filing this complaint.

2. Defendant, Hazel W. Marks, is a citizen of the United States and a resident of the District of Columbia.

3. That plaintiff and defendant are husband and wife, having been married in Rockville, Maryland on July 1, 1926.

4. There are five children of said marriage. Two children, Betty Melba Marks and Carl Alfred Marks are over 21 and three children are minors: Robert Wilson is 16 years of age, Charlotte Ann is 13 years of age and Sandra Marie is 9 years of age. All minor children have at all times been in the care and custody of the plaintiff.

5. That there are no property rights involved.

6. That the plaintiff and defendant lived together at 809 C Street N. E. That on August 28, 1950 the defendant deserted the plaintiff without any reason or cause.

7. That the plaintiff, since the defendant's desertion continued to reside at 809 C Street, N. E., and on November 1, 1951 moved to 1207 Eye Street, N. E., and he still presently resides there.

8. Upon information and belief, the defendant since the date of the separation aforerelated lived at 2511 Pennsylvania Avenue, N. W. and that in October, 1950 she moved to 1924 Pennsylvania Avenue where it is alleged she still presently resides.

WHEREFORE, the premises considered, plaintiff requests this court as follows:

1. That he be granted an absolute divorce from the defendant on the ground of two (2) years desertion by defendant.

2. That he be granted permanent custody of Robert Wilson Marks, Charlotte Ann Marks and Sandra Marie Marks.

3. For such other and further relief as to the court might seem just and proper.

/s/ JOHN L. MARKS.

District of Columbia, ss.:

JOHN L. MARKS, being first duly sworn on oath, deposes and says that he is the plaintiff above named and that the matters and things stated therein are true.

/s/ JOHN L. MARKS.

Subscribed and sworn to before me this 3rd day of September, 1952.

/s/ ANN C. WOLFE,
Notary Public, D. C.

/s/ BENJAMIN F. ROSSNER,
Attorney for Plaintiff,
Barr Building,
910 Seventeenth Street, N. W.,
Washington 6, D. C.,
DIstrict 6700.

Answer to Complaint for Absolute Divorce

(Filed Sep. 20, 1952.)

Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOHN L. MARKS,

Plaintiff,

vs.

HAZEL W. MARKS, 1924 Pennsylvania Ave., N. W.,
Defendant.

Civil Action No. 3934-52

Defendant, HAZEL W. MARKS, in answering the complaint for absolute divorce under ground of desertion sets forth:

1. Defendant admits the allegations of paragraph one pertaining to citizenship and residence of the plaintiff.
2. Defendant admits the allegations of paragraph two of the complaint reference to citizenship and residence of this defendant.
3. Defendant admits the allegations of paragraph three, admitting the date and place of marriage of defendant to plaintiff.
4. Allegations of paragraph four are admitted which pertain to the birth of five children three of whom are still minors and that said children are in custody of plaintiff.

5. Defendant admits there are no property rights involved in this proceeding.

6. Defendant denies that she deserted plaintiff as set forth in said complaint and for further answer to this paragraph refers to the cross-complaint filed herein.

7. Defendant admits the places of residence alleged by plaintiff.

8. In answering paragraph eight, defendant states that she never resided at 1207 I Street, N. E., in the District of Columbia.

9. And for further answer, and for counter-claim for absolute divorce—desertion, defendant sets forth:

COUNTER-CLAIM.

10. Defendant, HAZEL W. MARKS, an adult citizen of the United States, and resident of the District of Columbia for more than two years next preceding the filing of this complaint, sues the plaintiff, JOHN L. MARKS, also an adult citizen of the United States, and resident of the District of Columbia, in his own right, for relief as provided in Title 16, Sections 403, 410, and 415, of the Code of Laws for the District of Columbia.

11. Defendant and plaintiff were lawfully intermarried July 1, 1926, at Rockville, Maryland; that of this marriage five children have been born, to wit, ALFRED MARKS, age 21 years, MELBA MARKS, age 26 years, ROBERT MARKS, age 16 years, CHARLOTTE MARKS, age 14 years, and SANDRA MARKS, age 9 years, the last named three being infants, in custody of plaintiff.

12. Plaintiff and defendant lived and cohabited together as husband and wife until on or about August 27, 1950, when they separated by reason of cruel and inhuman treat-

ment exhibited by plaintiff upon defendant, which has destroyed the marital relationship herein, has made defendant ill and nervous, and defendant avers that she can no longer live and cohabit with plaintiff without prejudice to her health. Particularly defendant charges plaintiff has made malicious charges of infidelity against defendant well knowing same to be without legal justification. Plaintiff contends that there has been a constructive desertion herein.

13. Plaintiff has caused the children to be adverse to defendant as will be more fully disclosed at the time of the final hearing hereof.

14. Plaintiff has failed to support and maintain defendant for a period of more than six months prior to the filing of this action, although able financially so to do.

15. Defendant has been denied rights of visitation and right to have the minor children with her at reasonable and proper times and plaintiff has done everything humanly possible to hinder the children from seeing or visiting the mother and from the mother seeing or visiting with the children.

16. Wherefore the premises considered, defendant prays as follows:

1. That the original complaint herein be dismissed.
2. That defendant be awarded a judgment of absolute divorce from the plaintiff on the ground of constructive desertion or in the alternative a limited divorce on the ground of cruelty.
3. That defendant be awarded judgment for permanent maintenance.
4. That defendant be awarded the right to have and to visit the minor children herein.

5. That defendant be awarded an allowance of counsel fees and costs.

6. For such other and further relief in the premises as to the Court shall be deemed meet and proper.

/s/ HAZEL W. MARKS,
Defendant.

JOHN J. O'BRIEN,
Attorney for Defendant,
Evans Building.

District of Columbia, ss.:

HAZEL W. MARKS, being first duly sworn on oath deposes and says that she is the person named as defendant above; that she has read the foregoing complaint by her subscribed, and that she knows the contents thereof; that the matters and things therein related are true to the best of her knowledge and belief.

/s/ HAZEL W. MARKS,
Defendant.

Subscribed and sworn to before me this 19th day of September, 1952.

/s/ JACOB PERMUT,
Notary Public, D. C.

Copy of the foregoing was mailed, postage prepaid, to plaintiff's attorney of record, this 19th day of September 1952.

JOHN J. O'BRIEN,
Attorney for Defendant.

Answer to Counterclaim

(Filed Sep. 24, 1952.)

Harry M. Hull, Clerk

1. Plaintiff admits citizenship and residence as alleged in paragraph 10 of defendant's counterclaim.

2. Plaintiff admits the birth of five children of this marriage and that the minor children Robert Marks, Charlotte Marks and Sandra Marks are in his custody as alleged in paragraph 11 of defendant's counterclaim. That said children have always been in the complete care and custody of the plaintiff.

3. Plaintiff denies each and every allegation in paragraph 12 of the defendant's counterclaim. That defendant deliberately deserted the plaintiff and minor children herein without cause or justification. That the charges of infidelity are founded upon the defendant's own admissions to the plaintiff and her own daughter and as will otherwise be fully presented at the time of the hearing of this cause. Plaintiff denies constructive desertion as alleged by the defendant. That at no time did the defendant suffer from the separation as she actually caused and desired same. That subsequent to her desertion she refused to discuss reconciliation and made no effort to see the children who have always been cared for and maintained by the plaintiff.

4. That plaintiff denies each and every allegation in paragraph 13 of the defendant's counterclaim. That since the defendant's desertion, she visited the children on two occasions only, although she had been frequently requested by the plaintiff to see them. On one occasion the defendant stated that she would never take care of the children and she refused to assist in the care of Sandra when she was seriously ill.

5. The plaintiff denies each and every allegation in paragraph 14 of the defendant's counterclaim and states that she has never at any time requested support from the plaintiff. That the defendant is gainfully employed maintaining only herself. The plaintiff admits he is employed but denies that he is financially able to contribute anything to the defendant's support as his entire weekly earnings are expended in maintaining the children of this marriage and himself. That her claim for maintenance is not made in good faith and is made for the purpose of mulcting the plaintiff of money.

6. The plaintiff denies each and every allegation in paragraph 15 of the defendant's counterclaim and states she has never made any effort to see or visit the children and that since the date of her desertion from the plaintiff she has not telephoned to ascertain the children's welfare more than three times.

7. Further answering the defendant's counterclaim, the plaintiff states that defendant, previous to her desertion of the plaintiff, obtained evening employment. That the plaintiff faithfully met her every evening at 11:45 p. m. to take her home until February 1950, when the defendant stated to plaintiff that she was meeting a friend and told plaintiff she did not want him to meet her. Thereafter on May 15, 1950 at 12:45 a. m., the plaintiff confronted the defendant in a public park at 15th and I Streets, N. W., where she was in the arms of a man named Cecil R. Kelly, who was employed at the same building with the defendant.

8. That the defendant has admitted to the plaintiff and others that she has had relationships with Kelly on several occasions.

WHEREFORE, the premises considered, plaintiff requests as follows:

1. That the defendant's counterclaim be dismissed with prejudice.

2. That defendant be denied any relief.

3. And for such other relief as to the court may seem just and proper.

/s/ JOHN L. MARKS.

District of Columbia, ss.:

JOHN L. MARKS, being first duly sworn on oath, deposes and says that he is the plaintiff above named and that the matters and things stated therein are true.

/s/ JOHN L. MARKS.

Subscribed and sworn to before me this 23rd day of September, 1952.

(SEAL) /s/ ANN C. WOLFE,
Notary Public, D. C.

CERTIFICATE OF MAILING

Copy of the foregoing Answer mailed, postage prepaid, to John J. O'Brien, attorney for defendant, Evans Building, Washington, D. C., this 24th day of September, 1952.

/s/ BENJAMIN F. ROSSNER,
Attorney for Plaintiff,
Barr Building,
910 Seventeenth Street, N. W.,
Washington 6, D. C.
DIstrict 6700

**Judgment for Absolute Divorce
(Desertion)**

(Filed Dec. 18, 1952.)

Harry M. Hull, Clerk

This cause came on for final hearing at this term of court and it appearing to the satisfaction of the court that the parties were married on July 1, 1926; that the plaintiff has been a *bona fide* resident of the District of Columbia continuously for more than two years next preceding the commencement of this suit; that the defendant deserted the plaintiff on or about August 28, 1950, and that the parties have lived separate and apart without cohabitation continuously since that date; whereupon, upon consideration thereof, it is by the court this 18th day of December, 1952.

ADJUDGED, that the bond of matrimony now existing between the plaintiff, John L. Marks, and the defendant, Hazel W. Marks, be and it hereby is dissolved, provided, however, that this judgment shall not become absolute and take effect until the expiration of six (6) months after the date hereof, and until the expiration of the time allowed for taking an appeal or until the final disposition of any appeal taken in this cause. And it is further,

ORDERED AND ADJUDGED, that the counterclaim of the defendant be and same is hereby dismissed with prejudice, and it is further,

ORDERED AND ADJUDGED, that the plaintiff shall have permanent custody of the minor children, Charlotte Ann Marks, Sandra Marie Marks and Robert Wilson Marks. That as to Sandra Marie Marks and Robert Wilson Marks, the defendant be and hereby is granted reasonable visitation rights at the residence of the plaintiff at 1207 Eye Street, N. E., Washington, D. C. That as to Charlotte

Ann Marks, the defendant be and hereby is granted the privilege of having said child remain with her over week-ends. And it is further,

ORDERED AND ADJUDGED, that the plaintiff pay John J. O'Brien \$150.00, for his services as defendant's attorney.

As to the child, Sandra Marie Marks, the defendant reserves the right to come to court to have said child over weekends.

/s/ LUTHER W. YOUNGDAHL,
Judge.

Seen:

John J. O'Brien,
Atty. for Defendant.

A true copy.

Test:

HARRY M. HULL,
Clerk,

By DAVID W. KREIDLEBEYER,
Deputy Clerk.

Motion to Modify Final Judgment

(Filed Jun. 11, 1953.)

Harry M. Hull, Clerk

Defendant moves the Court to modify the final judgment herein to grant defendant right to have SANDRA MARIE MARKS with her over week-ends, and for reasons therefor refers to points and authorities attached.

The rules of this Court require that if you oppose the granting of this motion, you or your counsel shall *within*

FIVE DAYS from date of service of a copy of above motion upon you, or such further time as said Court may grant; or as the parties to this action may agree upon, file in reply with the clerk of this Court a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel herein.

JOHN J. O'BRIEN,
Attorney for Defendant,
Evans Building.

Service of copy of above motion was had on plaintiff by mailing copy thereof to his attorney of record, postage prepaid, at his address of record, this 1st day of June, 1953.

JOHN J. O'BRIEN,
Attorney for Defendant.

POINTS AND AUTHORITIES

1. The record herein.
2. Defendant mother is a fit and proper person to have the child named in her custody over week-ends.
3. Testimony to be given in support of this motion.

JOHN J. O'BRIEN,
Attorney for Defendant,
Evans Building.

Motion to Vacate Judgment for Absolute Divorce

(Filed Jun. 11, 1953.)

Harry M. Hull, Clerk

Defendant moves the Court (1) to vacate the final decree entered herein awarding plaintiff an absolute divorce, and for reasons therefor refers to the points and authorities attached.

The rules of this Court require that if you oppose the granting of this motion, you or your counsel, shall *within* FIVE DAYS from date of service of the above motion upon you, or such further time as said Court may grant, or as the parties to this action may agree upon, file in reply with the Clerk of this Court, a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel herein.

JOHN J. O'BRIEN,
Attorney for Defendant,
Evans Building.

Copy hereof was mailed, postage prepaid, to plaintiff's attorney of record, this 1st day of June, 1953.

JOHN J. O'BRIEN,
Attorney for Defendant,
Evans Building.

POINTS AND AUTHORITIES

1. The record herein.

2. Defendant denies she deserted plaintiff and that plaintiff misstated to the Court facts pertaining to the separation of the parties hereto.

5. Defendant has documentary evidence disclosing no desertion of plaintiff by defendant.

4. Other facts to be disclosed at time of hearing on the motion herein.

JOHN J. O'BRIEN,
Attorney for Defendant,
Evans Building.

Order

(Filed Jun. 30, 1953.)
Harry M. Hull, Clerk

Upon consideration of the various Motions filed by the defendant and the plaintiff's opposition thereto, it is by the court this 29 day of June, 1953,

ADJUDGED, ORDERED and DECREED, as follows:

1. That the Motion of the defendant to Modify Judgment For Absolute Divorce filed herein on or about January 17, 1953 be and the same is hereby denied.

2. That the Motions of the defendant to Modify Final Judgment, To Vacate Judgment for Absolute Divorce and To Adjudge Plaintiff in Contempt filed herein on or about June 1, 1953, be and the same are hereby denied.

3. That the defendant, Hazel Marks, pay to Benjamin F. Rossner, \$50.00 counsel fees.

/s/ LUTHER W. YOUNGDAHL,
Judge.

Copy of the foregoing Order mailed, postage prepaid, to John O'Brien, Attorney for defendant, Evans Building, this 26th day of June, 1953.

/s/ BENJAMIN F. ROSSNER.

Notice of Appeal

(Filed Jul. 30, 1953.)
Harry M. Hull, Clerk.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOHN L. MARKS,

Plaintiff,

vs.

HAZEL W. MARKS,

Defendant.

Civil No. 3934-52.

Notice is hereby given this 30th day of July, 1953, that Hazel W. Marks hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of June, 1953 in favor of John L. Marks against said Hazel W. Marks.

JOHN J. O'BRIEN,
Attorney for Defendant,
Evans Bldg.

Copy mailed to plaintiff's atty. of record this 30th day of July, 1953.

JOHN J. O'BRIEN.

Appellee's Att'y.
Benjamin F. Rossner,
Barr Bldg.

Designation of Record

(Filed Sep. 2, 1953.)

Harry M. Hull, Clerk

HAZEL W. MARKS, Defendant, having perfected an appeal herein to the United States Court of Appeals, for the District of Columbia circuit, hereby requests the Clerk to prepare a transcript of the records with the following papers and proceedings:

1. Judgment for absolute divorce entered December 18, 1952.
2. Order denying motion of defendant and awarding counsel fee.

JOHN J. O'BRIEN,
Attorney for Defendant.
Evans Building.

Copy of the foregoing Designation of Record was personally delivered to plaintiff's attorney of record this 2nd day of September, 1953.

JOHN J. O'BRIEN,
Attorney for Defendant.

**Order for Transmittal of Supplemental
Records on Appeal**

(Filed Sep. 14, 1953.)

Harry M. Hull, Clerk

Upon consideration of the motion of the plaintiff, it being shown that the appeal record was designated on September 2, 1953, being due on September 8, 1953, and that the plaintiff did not have the full ten days within which to counter designate record, it is by the court this 14 day of September, 1953.

ADJUDGED, ORDERED and DECREED, that the Clerk transmit the additional supplemental records on appeal:

1. Copy of docket entries.
2. Defendant's motion captioned "Motion to Modify Judgment For Absolute Divorce" dated January 16, 1953 (Exhibit "A").
3. Plaintiff's reply to motion to modify judgment for absolute divorce filed January 23, 1953.
4. Affidavit of John L. Marks filed January 23, 1953.
5. Affidavit of Charlotte Ann Marks filed January 23, 1953.
6. Defendant's motion captioned "Motion to Modify Final Judgment" filed June 11, 1953.
7. Defendant's motion captioned "Motion to Vacate Judgment for Absolute Divorce" filed June 11, 1953.
8. Plaintiff's Opposition to Motion to Modify Final Judgment filed June 11, 1953.
9. Plaintiff's Opposition to Vacate Judgment for Absolute Divorce filed June 11, 1953.

10. Motions card filed by defendant on June 25, 1953 on his motion dated January 16, 1953 captioned "Motion to Modify Judgment For Absolute Divorce" (Both sides of the card requested).

11. Affidavit of Robert Berberich filed December 12, 1952.

/s/ LUTHER W. YOUNGDAHL,
Judge.

Copy of the foregoing Order mailed, postage prepaid, to John J. O'Brien, attorney for defendant, Evans Building, Washington, D. C., this 11th day of September, 1953.

/s/ BENJAMIN F. ROSSNER
Attorney for Plaintiff.

BRIEF IN BEHALF OF APPELLEE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,946

HAZEL W. MARKS, *Appellant*,

v.

JOHN L. MARKS, *Appellee*.

**Appeal from the United States District Court
for the District of Columbia**

BENJAMIN F. ROSSNER,
Barr Building,
910 Seventeenth Street, N.W.,
Washington 6, D. C.,
Attorney for Appellee.

*United States Court of Appeals
For the
District of Columbia Circuit*
FILED NOV 10 1953

Joseph W. Stewart
CLERK

STATEMENT OF QUESTION PRESENTED

In the opinion of Appellee, the question is:

Does the U. S. District Court for the District of Columbia sitting in equity have inherent power to assess an attorney's fee against a defendant who has shown a disregard for the process of said Court?

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IN THE
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 11,946

HAZEL W. MARKS, *Appellant*,

v.

JOHN L. MARKS, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

APPELLEE'S BRIEF

COUNTERSTATEMENT OF CASE

On June 11, 1953 appellant filed three separate motions, captioned "Motion to Modify Final Judgment"; "Motion to Vacate Judgment for Absolute Divorce"; and "Motion to Adjudge Plaintiff in Contempt."

That the appellant filed a motions card in the lower court on only one of the captioned motions and at the request of appellee all motions were heard together.

Additionally the appellee informed the lower court that on or about January 16, 1953 the appellee had received a motion captioned "Motion to Modify Judgment for Absolute Divorce" (Appellee's App. 1) which was purportedly filed at court and that appellee had filed a reply to same accompanied with two affidavits. That appellant's motion of January 16, 1953 was never filed at court but, nevertheless, the appellant produced a motions card made out upon

same which bore a stamp of having been filed at court the day previous to the hearing on the motions stated in paragraph 1.

RULES INVOLVED

Local Civil Rule 9(a) (b) of the United States District Court for the District of Columbia.

Federal Rules of Civil Procedure 5(e).

SUMMARY OF ARGUMENT

The following actions of the appellant warranted the lower court to assess an attorney's fee against appellant.

(a) Failure of appellant to file at court a motion captioned "Motion to Modify Judgment for Absolute Divorce" received by appellee on or about January 16, 1953 to which appellee made a reply accompanied with two affidavits.

(b) The concerted efforts of the appellant in the lower court to endeavor to litigate issues on a piecemeal basis which resulted in oppressing and harassing the appellee.

(c) The filing of a motion on June 11, 1953 by appellant captioned "Motion to Vacate Judgment for Absolute Divorce" (Appellant's App. 14) which was completely without any foundation in law or fact. The judgment moved to be vacated was signed on December 18, 1952 and it appears that said motion was abandoned by the appellant and was brought to annoy and harass the appellee (Appellee's App. 2).

(d) Appellant has shown a disregard for the process of the court.

ARGUMENT

1. That the assessment made was within the judicial discretion of the lower court Judge and proper under the circumstances disclosed.

2. Ordinarily, a Judge exercises control of his court and has inherent power independent of any statute to adopt

such rules and regulations as may be necessary for the proper disposition of the business of his court.

3. Courts inherently possess ample right to reasonably exercise judicial discretion to enable them to wisely exert their authority.

4. Equity jurisdiction of the Federal Courts is the same as that which the high court of Chancery in England possesses and subject to neither limitation or restraint by state legislation, 28 U.S.C.A. 1625 (formerly 28 U.S.C.A. 725).

CONCLUSION

It is apparent that the court below had inherent power to assess against the appellant an attorney's fee, and the order of June 30, 1953 should be sustained.

Respectfully submitted,

BENJAMIN F. ROSSNER,
Barr Building,
Attorney for Appellee.

APPENDIX

APPENDIX

Case No. 11,946

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**JOHN L. MARKS, *Plaintiff*,

v.

HAZEL W. MARKS, *Defendant*.

Civil Action No. 3934-52.

Filed September 14, 1953. Harry M. Hull, Clerk.

Motion to Modify Judgment for Absolute Divorce

Defendant moves the Court (1) to modify the final decree entered herein pertaining to custody of minor child, Sandra Marie Marks, and (2) to adjudge plaintiff in contempt for failure to comply with provision of final decree entered herein pertaining to defendant's privilege of having a minor child remain with her over weekends, and for reasons therefor refers to the points and authorities attached.

The rules of this Court require that if you oppose the granting of this motion, you or your counsel, shall within Five Days from date of service of the above motion upon you, or such further time as said Court may grant, or as the parties to this action may agree upon, file in reply with the Clerk of this Court, a statement of points and authorities upon which you rely, and serve a copy thereof upon counsel herein.

/s/ JOHN J. O'BRIEN,
Attorney for Defendant.
Evans Building.

Copy hereof was mailed, postage prepaid, to plaintiff's attorney of record, this 16th day of January, 1953.

/s/ JOHN J. O'BRIEN,
Evans Building.

Points and Authorities

1. The record herein, *Marks v. Marks*, C. A. 3934-52.
2. By provision of final judgment entered herein your

defendant was granted the right to have Charlotte Anne Marks, one of the minor children of the parties, to remain with her over weekends, which condition has been breached by the plaintiff.

Defendant seeks modification of the order herein, to have the right to have Sandra Marie Marks, minor child of the par- hereto, to remain with defendant over weekends.

/s/ JOHN J. O'BRIEN,
Attorney for Defendant.
 Evans Building.

DISTRICT OF COLUMBIA, SS:

Hazel W. Marks, being first duly sworn under oath according to law deposes and says that by decree entered herein December 18, 1952, your affiant was granted the right of having Charlotte Anne Marks, one of her minor children, with her weekends; affiant avers that on the weekend of January 3, 1953, affiant called at the residence of plaintiff for the purpose of obtaining Charlotte Anne Marks, one of the minor children of plaintiff and defendant so that affiant could have the child with her over the weekend; affiant avers that she did not have the child with her on the said date of January 3, 1953, and affiant avers that she will be unable in the future to have the child with her unless this Court exercises the power to compel the plaintiff to cooperate to the end that your affiant will have her privilege executed. In the event your defendant is unable to exercise control over the children, then and in that event your affiant seeks custody of said children, with an allowance for her support.

Subscribed and sworn to before me this — day of January, 1953.

3 Filed June 11, 1953. Harry M. Hull, Clerk.

**Opposition to Vacate Judgment for
 Absolute Divorce**

1. The defendant's motion is without merit, factual or in

law, and is not within the purview of any of the rules of this court or the Federal Rules of Civil Procedure.

2. That this motion is not made in good faith and is simply made to annoy and harass the plaintiff.

Wherefore, plaintiff requests:

1. That this motion be dismissed with prejudice and the defendant be required to pay the plaintiff a reasonable attorney's fee for the presentation of same.

/s/ BENJAMIN F. ROSSNER,
Attorney for Plaintiff.

Copy mailed, postage prepaid, to John J. O'Brien, attorney for defendant, this 10th day of June, 1953.

/s/ BENJAMIN F. ROSSNER,